No. 15-674

In The Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATE OF WYOMING AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

PETER K. MICHAEL
Wyoming Attorney General
Counsel of Record
WYOMING ATTORNEY GENERAL'S OFFICE
2320 Capitol Avenue
Cheyenne, Wyoming 82002
(307) 777-7841
peter.michael@wyo.gov

JOHN G. KNEPPER
Chief Deputy Attorney General

DAVID L. DELICATH
Deputy Attorney General

JAMES MICHAEL CAUSEY
Senior Assistant Attorney General

CHRISTYNE M. MARTENS
Senior Assistant Attorney General

PHILIP MURPHY DONOHO
Assistant Attorney General

KATHERINE A. ADAMS
Special Assistant Attorney General

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF THE AMICUS CURIAE AND SUMMARY OF ARGUMENT

As a separate sovereign within the constitutional structure, Amicus, the State of Wyoming, is vested with an inherent autonomy to protect its interests in the creation and enforcement of its legal code against another sovereign's interposition. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982); *cf.* Pet'rs Br. 23. When another sovereign's actions frustrate a state's enforcement of its legal code in a manner that obliges either acquiescence or abandonment of its own distributive priorities, that state has directly suffered a particularized and cognizable injury. *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 50 n.17 (1986). A state put to such a choice has constitutional standing to litigate the question of whether its sovereignty has been impermissibly and unduly burdened.

Wyoming was party to a precedent widely cited by the parties-in-interest: *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). In that relatively brief opinion, this Court rejected many of the arguments presented by Petitioners here. Having prevailed in its claim that another state's economic policies wrought a constitutionally-cognizable injury on the state itself, Wyoming has a strong interest in ensuring that it, and other states, can continue to access the federal courts to seek redress for institutional injury to their sovereign interests. This species of standing is separate and distinct from a state's standing to vindicate its

proprietary interests as a market-participant or its standing to assert its quasi-sovereign interests in a *parens patriae* suit on behalf of its citizens. Denying the State of Texas and the twenty-five other Respondent States standing to challenge Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) would markedly curtail the states' ability to vindicate their sovereignty in what is often the only available forum – the federal judiciary. Wyoming strongly supports Respondents' standing and contends that the restrictive theories of standing advanced by Petitioners and amici are contrary to this Court's precedent, unworkable in practice, and unsound in principle.

ARGUMENT

I. *WYOMING V. OKLAHOMA* SUPPORTS RESPONDENT STATES' ARTICLE III STANDING

A. The Role of States in the Federal System Permits them to Assert their Sovereign Interests via Litigation

Standing under Article III of the Constitution inquires "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Litigants' "questions [must be] presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."

Flast v. Cohen, 392 U.S. 83, 95 (1968). This Court has reduced standing to an axiomatic three-part test comprising injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Because standing derives from this Court's jurisdiction over "Cases" and "Controversies" (U.S. Const. Art. III § 2, cl. 1), states, like other litigants, must show injury, causation, and redressability. States, however, are "not normal litigants for the purposes of invoking federal jurisdiction" and receive "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007). Each state surrendered certain sovereign prerogatives upon accession to the Union, so each state has a corresponding need – that other litigants lack – for a juridical avenue to defend the prerogatives it retains. *Id*. at 519-20. A state has "a judicially cognizable interest in the preservation of its own sovereignty, and a diminishment of that sovereignty by the alleged interference" of another sovereign is an injury within the meaning and comprehension of Article III. *Bowen*, 477 U.S. at 50 n.17. When a state suffers a "direct injury" to its sovereignty, the state's interest in redress differs from that of a private litigant. Even if private litigation might address the cause of the state's injury, the state's "interests would not be directly represented." *Wyoming*, 502 U.S. at 451-52. Because "a State is no ordinary litigant[,]" but is a sovereign, "it is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention."

Alfred L. Snapp, 458 U.S. at 612 (Brennan, J., concurring).

States thus have standing to sue on claims "implicat[ing] serious and important concerns of federalism" (*Maryland v. Louisiana*, 451 U.S. 725, 744 (1981)), one of which is "preserv[ation of] the integrity, dignity, and residual sovereignty of the States." *Cf. Bond v. United States*, 564 U.S. 211, 131 S. Ct. 2355, 2364 (2011). The special status of states in the Article III inquiry flows from the axiomatic observation that:

> the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another . . . preserv[ing] the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.

Id. Because they "retain 'a residuary and inviolable sovereignty[,]'" States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting The Federalist No. 39, at 245). It is therefore accepted that states have standing to protect their own "sovereign interests[.]" 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.11.1 (3d ed. & 2016 Supp.); *see also* Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and*

the Provision of Public Goods, 109 Colum. L. Rev. 798, 803, 806 (2009) (noting "[t]he categorical rule against the adjudication of sovereign interests became untenable" by the early twentieth century).

The need for states to have access to the judicial forum to protect their residual sovereignty arises because, "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives[,]" with "[t]hese sovereign prerogatives . . . now lodged in the Federal Government[.]" *Massachusetts*, 549 U.S. at 519. Their ability to vindicate these sovereign interests thus diminished, the states' only "alternative to force is a suit in . . . court." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). Therefore, when a state alleges that its retained sovereign prerogatives have been diminished, it has alleged an injury cognizable by Article III. *See Bowen*, 477 U.S. at 50 n.17; *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 442-43 (D.C. Cir. 1989) (finding standing where the alleged injury was to states' sovereign interest in the continued enforceability of state law in the face of preemption by federal rule).

The unique nature of residual sovereignty means that states are "entitled to special solicitude in [this Court's] standing analysis." *Massachusetts*, 549 U.S. at 520. Although a state lacks standing "to protect her citizens from the operation of federal statutes" (*Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945)), it has standing "to assert its rights under federal law[.]" *Massachusetts*, 549 U.S. at 520 & n.17; *Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995) (recognizing Wyoming's

standing to assert its own interests independent of its citizens). Phrased in terms of the three-part Article III standing inquiry, a state's status as a litigant informs each prong of the analysis – injury, causation, and redressability. *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138, 1143 (2013).

Rejecting the standing of the twenty-six Respondent States would ignore the special solicitude that this Court recognized was due states in *Massachusetts v. EPA*. To do so would also treat states less favorably than private litigants by denying them redress when their interests are directly affected. This would require that the states' sovereign interests be litigated, if at all, by others. *Cf. Susan B. Anthony List v. Driehaus*, 573 U.S. ___, 134 S. Ct. 2334, 2341 (2014) (requiring that litigants have a "personal stake in the outcome of the controversy").

Far from a "radical expansion" of state standing (Pet'rs Br. 29), the Fifth Circuit's reasoned application of standing principles to this case is an ineluctable consequence of the doctrine itself. Pet. App. 26a-28a. Accordingly, a finding that Respondents do not have standing to litigate the claim that DAPA impermissibly interferes with their sovereignty would undermine long-settled ideas about state standing. This Court's federalism jurisprudence is made possible by the states' sovereign standing and their ability to safeguard their residual sovereignty through the federal courts rather than resorting to self-help. *Cf. Bond*, 131 S. Ct. at 2364 (recognizing and discussing the multiple axes of federalism – that which

protects the balance between the federal government and the states, which "ensure[s] that States function as political entities in their own right[,]" and that which protects the individual against the state more generally).

This Court has held that "a State has standing to sue . . . when its sovereign or quasi-sovereign interests are implicated. . . ." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam) (citations omitted). While this Court has not catalogued every sovereign interest, it has "easily identified" the states' interest in the creation and enforcement of their own legal codes, and their right to have their sovereignty recognized:

> First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction – this involves the power to create and enforce a legal code, both civil and criminal; second, the demand for recognition from other sovereigns – most frequently this involves the maintenance and recognition of borders. The former is regularly at issue in constitutional litigation. The latter is also a frequent subject of litigation[.]

Alfred L. Snapp, 458 U.S. at 601. Concurring, Justice Brennan articulated the point in terms that a majority of this Court ultimately adopted in *Massachusetts v. EPA*:

> **a State is no ordinary litigant**. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention.

> I know of nothing – except the Constitution or overriding federal law – that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest.

Compare id. at 612 (Brennan, J., concurring) (emphasis added) *with Massachusetts*, 549 U.S. at 518.

Beyond its sovereign interests, a state has standing *parens patriae* to assert an injury to its quasi-sovereign interests. *Alfred L. Snapp*, 458 U.S. at 601. Quasi-sovereign interests are the state's interests in the physical and economic health and well-being of its people. *Id*. at 602-04, 607. Those interests are distinct from a state's sovereign interests in its civil and criminal legal codes and demands for recognition from other sovereigns. *Id*. Those interests are also distinct from a state's non-sovereign proprietary and business interests. *Id*. at 601-02.

Likewise, courts have recognized states' standing to vindicate their proprietary interests. *Id*. (recognizing that when a state "own[s] land or participate[s] in a business venture . . . [it is] likely to have the same interests as other similarly situated proprietors"); *see also Nebraska*, 515 U.S. at 20 (recognizing Wyoming's standing to asserts its own interests "independent of and behind the titles of its citizens, in all the earth and air within its domain") (quotation omitted); *Hodges v. Abraham*, 300 F.3d 432, 442-45 (4th Cir. 2002) (recognizing state's claim that Department of Energy failed to comply with the

National Environmental Policy Act because "the Governor, in his official capacity, is essentially a neighboring landowner, whose property is at risk of environmental damage").

With these principles in mind, courts have had little difficulty concluding that states, like Respondents here, have standing to litigate claims that their sovereign interest in continued enforcement of a legal code has been injured by the acts of another sovereign. *Alaska*, 868 F.2d at 443; *Ohio ex rel. Celebrezze v. United States Dep't of Transp.*, 766 F.2d 228, 232-33 (6th Cir. 1985); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241-42 (10th Cir. 2008).

B. Standing under *Wyoming v. Oklahoma* is Broader than Petitioners and Supporting Amici Suggest

The parties disagree about how to interpret this Court's decisions in *Pennsylvania v. New Jersey* and *Wyoming v. Oklahoma*. The Petitioners and supporting amici cite *Pennsylvania v. New Jersey* for the proposition that when the operation of a state's law is tied to the choices of another sovereign, any resulting injury to that state is self-inflicted and not constitutionally cognizable. Pet'rs Br. 24-28. Respondents contend that *Wyoming v. Oklahoma* controls because the injury to Texas, like the injury to Wyoming, is financial. Resp'ts Br. 21.

Despite the relative brevity of its discussion, *Wyoming v. Oklahoma* recognizes a principle of sovereign standing that is broader than Petitioners and supporting amici contend; indeed, the case – and this Court's cursory rejection of Oklahoma's efforts to defeat standing – is broadly consistent with the federalism jurisprudence recognizing a spectrum of litigable state interests. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 187-88 (1992) (recognizing a state's standing to sue the federal government on claimed violation of Tenth Amendment). Specifically, states have standing to protect their proprietary, quasi-sovereign, and sovereign interests. 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.11.1 (3d ed. & 2016 Supp.).

The controversy in *Pennsylvania v. New Jersey* was premised on this Court's earlier holding in *Austin v. New Hampshire*, 420 U.S. 656 (1975). *Pennsylvania*, 426 U.S. at 661-62. In *Austin*, this Court examined New Hampshire's Commuter Income Tax, which imposed a tax on the New Hampshire-derived income of nonresidents. *Id.* at 662. While the income of New Hampshire residents was also taxed, the net effect of the tax and its exemptions tied to the tax codes of other states was such that only non-residents paid taxes on income earned in New Hampshire. *Id.* In deciding *Austin*, this Court sided with the taxpayers and held that the New Hampshire tax was unconstitutional because it offended the Privileges and Immunities Clause of the United States Constitution

and the Equal Protection Clause of the Fourteenth Amendment. *Id.*; *Austin*, 420 U.S. at 657.

Based on that holding, Maine, Massachusetts, and Vermont sued New Hampshire, while Pennsylvania sued New Jersey over the operation of its similar tax. *Pennsylvania*, 426 U.S. at 662-63. However, this Court dispatched the plaintiff states' assertion that they were entitled to an accounting of the taxes collected in violation of the Privileges and Immunities and Equal Protection Clauses by saying that "[t]he short answer to these contentions is that both Clauses protect people, not States." *Id*. at 665. This Court also reasoned that neither of the defendant states had inflicted any injury on the plaintiff states because nothing required the plaintiff states to reciprocally extend tax credits or prevented them from withdrawing them. *Id*. at 664. Thus, this Court reasoned that "[n]o State can be heard to complain about damage inflicted by its own hand." *Id*.

While recognizing "the legitimacy of Parens patriae suits" (*Id*. at 665 (citations omitted)), this Court disposed of Pennsylvania's *parens patriae* claim, deeming it "nothing more than a collectivity of private suits against New Jersey for taxes withheld from private parties" and concluded that "[n]o sovereign or quasi-sovereign interests of Pennsylvania [were] implicated." *Id*. at 666.

The interests asserted in *Pennsylvania v. New Jersey* were not those of a state, but were those of its taxpayers. Permitting Pennsylvania to aggregate

individual complaints – thereby transmuting them into a single, "quasi-sovereign" complaint – would have defeated this Court's bar against an individual's generalized grievances. Therefore, rejecting the plaintiff states' standing was consistent with this Court's long and unobjectionable rejection of generalized grievances. *See, e.g., Flast*, 392 U.S. at 106 (rejecting taxpayer's litigation "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System").

In *Wyoming v. Oklahoma*, Wyoming sought to vindicate "one of its essential sovereign functions." Compl. at 4.[1] As a leading state in the production and sale of coal, Wyoming sought to maintain the integrity and ongoing viability of its severance and *ad valorem* taxation schemes in the face of interference by another sovereign. *Id*. The vast majority of Wyoming's coal production was destined for interstate consumption, transported by rail. *Id*. at 5. From the moment the coal left the mine at the rail spur, it was subject to one of "the most pervasive and comprehensive of federal regulatory schemes. . . ." *Chicago & N.W. Transp. Co. v. Ralo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Wyoming was thus limited in its

[1] Citations to court documents refer to the filings in *Wyoming v. Oklahoma*, available at the National Archives Building (RG267, Records of the Supreme Court of the United States, Original Jurisdiction Case Files, 1792-2011, Selected Cases, Box 974/A1/Entry 26).

ability to generate revenue from the extraction of its coal.[2] *See Nebraska*, 515 U.S. at 20 (recognizing Wyoming's standing to assert its own interests "in all the earth . . . within its domain"). Against this comprehensive backdrop, taxation on coal production was one of the few mechanisms Wyoming had to exercise its sovereign interests within the broader federal system. Report of the Special Master, 1990 WL 10561260, at *9; Br. in Supp. of Mot. for Leave to File Compl. at 12.[3] Thus, when Oklahoma passed a law requiring that ten percent of the coal burned to generate electricity in that state be produced in Oklahoma, Wyoming stood to lose at least a portion of the $9,000,000 in severance tax payable by Oklahoma utilities. Compl. at 4.

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[2] The federal government, under the Interstate Commerce Commission, had the exclusive power to regulate interstate railroads. *See generally Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886). The federal government's preemption of the field was enlarged further by the Staggers Rail Act of 1980. *See Texas v. United States*, 730 F.2d 339, 344 (5th Cir. 1984) (superseded on other grounds by rule as acknowledged in *Burlington N. R.R. Co. v. Public Utility Comm'n of Texas*, 812 F.2d 231 (5th Cir. 1987)). The Federal Power Act also impacted this area. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982) (discussing the interrelationship between a state's regulatory authority under the Federal Power Act and its obligations under the dormant commerce clause).

[3] *Powder River Coal Co. v. Wyo. Dep't of Revenue*, 145 P.3d 442, 446 (Wyo. 2006) (noting that "[t]he Wyoming Constitution provides that all mines 'shall be taxed . . . in lieu of taxes on the lands[ ] on the gross product thereof . . . provided, that the product of all mines shall be taxed in proportion to the value thereof.' Wyo. Const. [A]rt. 15, § 3").

Assessed when the coal was mined and calculated based on the prevailing market rate, the revenue generated by Wyoming's statutory severance tax was designed to approximate the effects of coal production itself. Br. in Supp. of Mot. for Leave to File Compl. at 13-14. Although the tax was assessed irrespective of the ultimate consumer, disruption in the interstate market nonetheless threatened the Wyoming taxation scheme by reducing a specific source of revenue and raising the risk that it would not be made up from other sources. *Id*. at 17.

Beyond the economic harm Wyoming suffered when Oklahoma enacted its protectionist coal policy, Wyoming suffered an altogether distinct type of injury: harm to its sovereign capacity to act in, and rely on the consistency of, a federally-regulated market. Compl. at 5; *see also* Okla. Br. in Supp. of Mot. for Summ. J. and in Opp. to Wyo.'s Mot. for Summ. J. at 17. When Oklahoma thus sought to change the rules of the game, the reliance Wyoming placed in the uniform operation of the federal regulatory environment, on which Wyoming partially predicated its mineral taxation regime, was impaired. Br. in Supp. of Mot. for Leave to File Compl. at 19. There was "no action which Wyoming could take to avoid [that] injury, other than initiating" an original action in this Court. *Id*.

In response, Oklahoma challenged Wyoming's standing to sue, claiming: (1) its injury was "attenuated because Wyoming is not a producer or a consumer of coal" and (2) "that Wyoming producers

could easily sell their coal to other users," making Wyoming's injury indirect. Resp. to Mot. to Dismiss at 5. Wyoming answered Oklahoma's claims with the observation that, because the "matter does not involve private litigants" but instead "involves a controversy between two states with federalism concerns[,]" the analysis of the nature and cause of Wyoming's injury was different than in a suit between private parties. *Id*. Wyoming contended it was injured because:

> [a]n oversupply of coal created by loss of sales means that Wyoming producers must sell their coal, if at all, at significantly lower prices than provided for in original contracts. If there are fewer coal sales at a lower price, obviously, less severance tax will be collected by the State of Wyoming.

Id.

The state's injury passed through several intermediary inferences: (1) excess supply; plus (2) relatively inflexible consumption; causing (3) downward pressure on the interstate spot price for coal; that (4) could not be made up because of stickiness of the price-point in a regulated and crowded market; meant (5) less severance tax revenue; which equaled an (6) injury to Wyoming that could "fairly be traced to the defendant." *Id*. (quoting *Maryland*, 451 U.S. at 736). Oklahoma's argument that Wyoming had not been injured because it could make up the lost volume elsewhere was based on "the fallacious assumption that a ton of coal not sold to Oklahoma

utilities can be sold to another customer" as opposed to being "simply a ton of coal that is not produced, on which no severance or ad valorem taxes or royalties are paid." Resp. of Wyo. to Okla.'s Mot. for Summ. J. and Br. in Supp. of Resp., 1989 WL 1642574, at *16.

Oklahoma also argued that Wyoming's injury was "self-inflicted" because it could simply raise or alter the severance tax on coal to make up the difference. *Id*. at *17; *see also* Okla. Br. in Supp. of Mot. for Summ. J. and in Opp. to Wyo.'s Mot. for Summ. J. at 23 (citing *Pennsylvania*, 426 U.S. at 664). In setting the severance tax, Wyoming made the policy choice to sunset a higher rate **before** Oklahoma enacted its protectionist policy. *Id*. at *18. Characterizing the injury Wyoming suffered as "self-inflicted" would thus put the state to an injurious choice: **either** change its laws by undoing the sunset provision to avoid the harm **or** stick to its policy choice and suffer an injury by collecting less severance tax revenue. *Id*. Wyoming could not do both, and the fact that the state could undo an economic harm by suffering a sovereign one did not mean that it was un-injured or that its injury was self-inflicted. *Id*. at *11-14.

The Special Master rejected Oklahoma's arguments that Wyoming's injury was "indirect and derivative[,]" generalized, or self-inflicted. Report of the Special Master, 1990 WL 10561260, at *11. He found the injury was sufficiently direct for Wyoming to have standing because Wyoming's injury was not one to its "economy in general and the corresponding effect on

general tax revenues." *Id*. at *12. The Special Master rejected Oklahoma's contention "that Wyoming has only itself to blame for any reductions in severance tax revenues, because it has lowered its severance tax rate . . . and has based the tax on the coal's market value, which has been declining, rather than on tonnage produced." *Id*. at *14. The "existence of alternative means of generating tax revenues" was "not analogous to the reciprocity provisions that the Court has held to constitute 'self inflicted injury.'" *Id*. (quoting *Pennsylvania*, 426 U.S. 660).

At oral argument before this Court, Oklahoma argued that permitting Wyoming standing would invite "end-running" around the typical rules of jurisdiction by permitting states to appear as "State qua State[.]" Oral Arg., 1991 WL 636275, at *4-5. In the alternative, Oklahoma argued that the coal companies were, like the taxpayers in *Pennsylvania*, fully capable of litigating their own interests, and that Wyoming was asserting those interests vicariously. *Id*. at *7-8. Oklahoma continued to assert that Wyoming's injury was only "incidental" and "indirect[.]" *Id*. at *8-9 (citing *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976)). Oklahoma also argued that Wyoming's injury was illusory because it "has produced more coal and it continues to produce more coal" and because coal consumption in Oklahoma had increased after enactment of its protectionist policy. *Id*. at *10.

Wyoming, in response to Oklahoma's vicariousness argument, countered that "the injury that the

State of Wyoming has sustained" was distinct from that suffered by any coal producer. *Id*. at *19. Oklahoma contended that Wyoming had not suffered a loss in volume because the "same coal that would otherwise have been sold to Oklahoma might . . . have been sold elsewhere," which it asserted was confirmed by the fact that "its severance tax revenues are as high as ever[.]" *Id*. at *20-22. Wyoming, citing its excess production capacity, responded that it was injured by the lost volume, and that the injury was not to its "general kind of taxing power [as] a State[,]" but was direct "because of the way that we use that money and that we do impose that [severance] tax." *Id*. at *22, 25, 26.

This Court found Wyoming had standing. Specifically, the Court analogized Wyoming's injury to the types of institutional or associational injury sufficient to confer standing. *Wyoming*, 502 U.S. at 449 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)). Contrasting Wyoming's claim to one where a state claimed injury to its economy and tax revenues generally, this Court found Wyoming's injury sufficiently direct and specific to support standing. *Id*. at 448.

The dissent argued that Wyoming's injury was both indirect and speculative in that the loss of coal sales did not necessarily or proportionally track the loss of severances. *Id*. at 466 (Scalia, J., dissenting). To the extent that Wyoming had excess coal production volume, then, its cause could equally have been attributed to the profit-maximizing decision, in

light of "current market prices[,]" to leave the mines fallow without any decrease in severance caused by Oklahoma's law. *Id*. at 467. While recognizing "Wyoming's right to collect taxes[,]" the dissent contended that this right was not within the "zone-of-interests" comprehended by the Commerce Clause. *Id*. at 809 (discussing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982)).

C. *Wyoming v. Oklahoma* Cannot Be Reconciled with the Theory of Self-Inflicted Injury Advanced by Petitioners and Supporting Amici

The restrictive conception of standing marketed by Petitioners and supporting amici would render *Wyoming v. Oklahoma* a dead letter while calling into doubt the continuing vitality of this Court's federalism jurisprudence more generally. There is no party more suited to litigate questions of structural federalism based on a claim that federal regulatory activity has overborne the residual sovereignty of a state than the state itself: "[b]ecause the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' [necessary for] defending" it. *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (citations omitted). Although expressed in monetary terms, the basis of Wyoming's standing to sue Oklahoma was its frustration of "one of [Wyoming's] essential sovereign functions[.]" Compl. at 4. As such, the case was neither a marginal case testing the proposition that states lack

standing to bring their claims of injury to the general taxing power, as asserted by AFL-CIO, nor an exception to the justiciability limits they perceive in *Pennsylvania v. New Jersey*, as asserted by Professor Dellinger.

Here, Petitioners and amici posit the same parade of horribles that Oklahoma suggested would befall the law of standing, especially "end-running" of the requirements of Article III. Pet'rs Br. 29; Dellinger Br. 10; AFL-CIO Br. 10; Oral Arg., 1991 WL 636275, at *4-5. This Court's recognition of Wyoming's standing to sue suggests both that: (1) a state's claims that its residual sovereignty has been overborne are judicially cognizable and (2) standing will not be obviated by a defendant's assertions that the state could avoid those injuries by submitting to the other sovereign's actions and simply readjusting its legislative or regulatory priorities. *Wyoming*, 502 U.S. at 446-49. Indeed, the swiftness with which the Special Master and this Court disposed of the claims to the contrary highlights the extent to which this principle of sovereign standing was noncontroversial. *Id*.

The noncontroversial nature of Wyoming's standing is further supported by the absence of any of the limiting doctrines divined by Petitioners and amici from the text of this Court's opinion. AFL-CIO posits, without discussion, that *Wyoming v. Oklahoma* is no more than a prosaic observation that a plaintiff must have "sustained or [be] immediately in danger of sustaining some direct injury as the result

of the challenged official conduct." AFL-CIO Br. 6 (quoting *Lujan*, 504 U.S. at 579, 581 (Kennedy, J., concurring in part and concurring in the judgment) (internal quotations omitted)). While it is true that this Court found that Wyoming had directly suffered a specific injury, AFL-CIO ignores the strenuous opposition to that finding by Oklahoma, and instead portrays *Wyoming v. Oklahoma* as a straightforward example of "directness" in injury and causation distinguishable from that suffered by Texas and the other states here. *Id*. The distinction cannot bear the weight AFL-CIO's argument requires without doing violence to the facts and the holding of *Wyoming v. Oklahoma*. Texas's injury here is at least as direct as that suffered by Wyoming when, by virtue of another sovereign's acts: (1) coal sales were lost; (2) creating an oversupply of coal; (3) driving down prices; (4) in a manner producers could not readily make up in the federally regulated marketplace; (5) resulting in lower severance tax (a) assessed at time of extraction and (b) based on the prevailing market rate. Br. in Supp. of Mot. for Leave to File Compl. at 5. Despite that inferential chain, this Court recognized that Wyoming was directly and specifically injured. *Wyoming*, 502 U.S. at 448.

Likewise, Professor Dellinger misses the mark when he submits that any injury a state suffers is "self-inflicted" if "a sovereign[ ] attempt[s] to challenge another sovereign's law on which the first sovereign had voluntarily based eligibility for a

benefit[.]" Dellinger Br. 9 & n.5. He therefore concludes that such self-inflicted injuries are not within the comprehension of *Wyoming v. Oklahoma*. *Id*. That case simply does not support that conclusion and, in fact, casts it into doubt because this Court saw no need to address Oklahoma's self-inflicted injury theory in its opinion. *Wyoming*, 502 U.S. at 446-54.

Professor Dellinger offers no principled reason to limit a state's forfeiture of standing to its benefits eligibility standards. His argument would handcuff a state to any and all subsequent legal or regulatory changes, apparently no matter their breadth or character, on no ground more reasoned than the state's earlier adoption of another sovereign's verbiage. Thus, Professor Dellinger's position is not a distinction from *Wyoming v. Oklahoma*, it is its repudiation because, if he were correct, that case must have been wrongly decided. Wyoming's decision to sunset a higher marginal severance tax rate and tie it to the market rates instead of production would have made the subsequent diminution in severance tax revenue "self-inflicted" and thereby prevented judicial redress. Oklahoma pressed this very point and failed. Report of the Special Master, 1990 WL 10561260, at *14.

Petitioners similarly perceive limiting principles in *Wyoming v. Oklahoma* that simply are not there. While adopting the thesis that standing under the case requires that a state never "tie its law to that of another sovereign," Petitioners graft a further limitation onto *Wyoming v. Oklahoma*: that the policy affected by another sovereign's actions "depend[s] solely

on activity in" the plaintiff state. Pet'rs Br. 26-27. This reductionist account of what was actually going on in *Wyoming v. Oklahoma* is untenable. While Wyoming was taxing the severance of coal mined in-state, that coal would not have been mined without a purchaser in another state. Resp. to Mot. to Dismiss at 5. Therefore, the core of Wyoming's complaint was that the interstate shipment of Wyoming coal, and resultant severance tax collections, were affected by Oklahoma's actions. *Id*. It is incorrect to describe the policy implicated there as "depend[ent] solely on activity in Wyoming." *Cf*. Pet'rs Br. 26-27.

Were the Court to adopt the substantial restrictions urged by those who oppose the Respondent States' standing, a long line of this Court's cases recognizing state sovereign standing to litigate questions of vertical federalism would be called into doubt: *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (recognizing state's Constitutional control over election procedures and its ability to litigate claim that such control was impermissibly affected by federal legislation); *New York*, 505 U.S. at 187-88 (recognizing state's standing to sue federal government on claimed violation of Tenth Amendment); *Printz v. United States*, 521 U.S. 898, 927 (1997) (rejecting United States' "distinction between 'making' law and merely 'enforcing' it, between 'policymaking' and mere 'implementation,'" and thus recognizing state official's cognizable injury suffered when federal government legislatively commandeered state resources); *Massachusetts*, 549 U.S. at 521 (recognizing that

state's standing to litigate claimed injury flowing from federal regulations "satisfied the most demanding standards of the adversarial process"); and *cf*. *Bond*, 131 S. Ct. at 2364 (rejecting argument that only states had standing to pursue federalism claims, while recognizing that one of that doctrine's aspects "serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another . . . preserv[ing] the integrity, dignity, and residual sovereignty of the States . . . ensur[ing] that States function as political entities in their own right").

Without explicitly overruling these cases, a finding that Respondents lack standing here would accomplish the same end. Professor Dellinger, for example, attempts to reconcile Texas's injury, which he argues is self-inflicted and not cognizable, with the "special solicitude" this Court recognized was due states in *Massachusetts v. EPA* by creating a spectrum of sovereignty and denying standing to all but those injuries that go "directly to its sovereignty as a State[.]" Dellinger Br. 24. That spectrum of sovereignty exists, if at all, outside of this Court's jurisprudence.

This Court's extensive federalism jurisprudence fails to support such a distinction; rather, the often abbreviated discussion of standing in those cases – and the ease with which this Court found the states to have standing – belies any stratified standing analysis. Short of the conclusion that Texas's injury here fails his test, Professor Dellinger provides this

Court and future litigants with no clear demarcation between those injuries that strike directly at a state's sovereign *sanctus sanctorum* and those that merely erode the sovereign periphery. The lack of any principled distinction is itself grounds to reject the arguments of those opposing Respondents' standing: the sovereignty "question [is] no more 'political' than a host of others [this Court has] entertained." *Baker v. Carr*, 369 U.S. 186, 246 n.3 (1962) (Douglas, J., concurring). And it is all the more objectionable that this delicate determination would be decided at the threshold, under the guise of standing, instead of at the merits stage. *Davis v. United States*, 564 U.S. ___, 131 S. Ct. 2419, 2434 n.10 (2011) (cautioning against "confus[ing] weakness on the merits with absence of Article III standing").

II. WASHINGTON AND THE JANE DOES' ATTACK ON RESPONDENTS' STANDING IS LEGALLY AND FACTUALLY FLAWED

The State of Washington, joined by other states and the District of Columbia (collectively Washington), filed amicus briefs supporting Petitioners and discussing ways in which DAPA would "increase state tax revenue, benefit state economies, enhance public safety, and help families stay together. . . ." Br. of Wash. et al., in Supp. of Pet'rs on Pet. for Writ of Cert. (Wash. Br. I) 3; Br. of Wash. et al., in Supp. of Pet'rs on Writ of Cert. (Wash. Br. II) 9-11. Washington also urges this Court to consider offsetting benefits to determine whether Respondents suffered an injury

for purposes of Article III standing. Wash. Br. I 10-11; Wash. Br. II 5-7.

Additionally, three "undocumented immigrant mothers of U.S. citizen children and longtime residents of Texas" (Jane Does) filed a brief in support of Petitioners in which they criticized the court of appeals for not scrutinizing Texas's estimate of the cost of issuing driver's licenses to DAPA beneficiaries, assert Texas's factual calculation of those costs is incorrect, and echo Washington's offsetting benefits argument. Intervenors' Br. (Intv'r Br.) 29-35.

A. Amici and the Intervenors' Version of Article III Standing is Contrary to Precedent and Unworkable

Washington and the Jane Does urge this Court to impose a new, paternalistic approach to standing, a "wrinkle [that] has mercifully been passed by." 13A Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.4 (3d ed. & 2016 Supp.). Standing is not an opportunity for the courts to decide whether the plaintiff has been sufficiently aggrieved. "Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant." *Id*.

The United States Court of Appeals for the Third Circuit examined the issue of offsetting benefits in *National Collegiate Athletic Assn. v. Governor of New*

Jersey, 730 F.3d 208, 223-24 (3d Cir. 2013) (*NCAA*), but determined that "[a] plaintiff does not lose standing to challenge an otherwise injurious action simply because he may also derive some benefit from it" and, further, "standing analysis is not an accounting exercise and it does not require a decision on the merits." *Id.* (citing *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006); 13A Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.4 (3d ed. 2008)).

Appellate courts that have addressed offsetting benefits in the context of standing have similarly declined to establish the categorical rule advanced by the amici and Intervenors. *See Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 657 (9th Cir. 2011) ("[W]e disagree with the Secretary's premise that a hospice provider may be found to have standing to mount a facial challenge to the hospice cap regulation only if it suffered a 'net' increase in its overpayment liability within the accounting year at issue in its administrative appeal."); *Denney*, 443 F.3d at 265 ("[T]he fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing."); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 574-75 (6th Cir. 2005) (increased risk from faulty medical device creates injury-in-fact, even if class members' own devices had not malfunctioned and may have been beneficial); *Aluminum Co. of Am. v. Bonneville Power Admin.*, 903 F.2d 585, 590 (9th Cir. 1989) (rejecting agency's standing argument

because "[t]here is harm in paying rates that may be excessive, no matter what the California utilities may have saved").

The Fifth Circuit in this case, therefore, correctly recognized that "standing analysis is not an accounting exercise" and rejected Petitioners' offset argument. Pet. App. 21a-23a (internal quotations omitted) (citing *NCAA*, 730 F.3d at 223). In doing so, the court distinguished Texas's economic injury and the alleged offset from its own circuit precedent, *Henderson v. Stalder*, 287 F.3d 374, 377 (5th Cir. 2002), noting that the relationship between the cost of the challenged program and the offset in that case "involved a much tighter nexus." Pet. App. 22a.

In *Henderson*, the Fifth Circuit determined that plaintiff taxpayers lacked standing to challenge a Louisiana statute that established a "Choose Life" license plate for private vehicles as well as a "Choose Life" fund. *Henderson*, 287 F.3d at 377, 380-81. The court reached this conclusion because motorists had to pay an additional $25.00 license fee and $3.50 handling fee to obtain a "Choose Life" license plate, which offset the plaintiffs' claimed injury as taxpayers. *Id.* at 379-81.

It is no surprise that the court of appeals did not set forth detailed rules regarding offsets in *Henderson* because the offset was plain on its face. *See id.* at 377, 380-81. The offsetting fees negated the plaintiffs' alleged injury as taxpayers—government expenditure to support religious expression. *Id*.

Here, the nexus between the benefits the amici and Intervenors identify – such as improved public safety, a higher rate of insured drivers, increased tax revenue, increased gasoline tax revenue, and "increased vehicle-registration fees, title fees, and usage-based lubricant taxes" – and the issuance of driver's licenses under DAPA is attenuated. Wash. Br. II 5-6; Intv'r Br. 33-34. Those benefits are based on the assumption that a DAPA beneficiary who obtains a driver's license will then obtain car insurance, purchase a specific amount of gasoline, register a vehicle, and pay title fees. It is not only difficult to determine whether these benefits will come to fruition, it is also difficult to quantify them. This is particularly true without full briefing of the issues, testimony from economists and experts, and in-depth analysis that the amici and Intervenors simply have not provided.

From a policy perspective, the paternalistic, speculative offsetting benefit analysis that Washington and the Jane Does propose is unworkable. The benefits they identify are precisely the types of benefits that a court should not be required to sort through to determine whether a plaintiff has established standing. The benefits are difficult to quantify, which is likely why neither Washington nor the Jane Does are able to definitively quantify the offsets they identify. Washington and the Jane Does also cannot point to case law that even colorably sets forth the rule they want this Court to apply to find that Respondents do not have standing. Standing

law has not developed in the manner they propose precisely because requiring parties and courts to account for offsetting benefits that do not bear a direct nexus to the claimed injury would transform standing into a mini-trial that would obscure the relevant legal issues and unnecessarily burden courts and litigants.

B. Amici and the Intervenors' Factual Arguments are Unduly Simplistic

Washington's initial brief focuses on increased tax revenue to the exclusion of potential costs of DAPA. *See* Wash. Br. I 3-5. Washington states that it is "widely accepted that allowing undocumented immigrants to work legally increases tax revenue." *Id.* at 4. Washington further cites a journal article to support the premise that immigrant workers benefit states and the nation because they help meet the demand for scientists and engineers and provide low-skilled labor that helps decrease the cost of living with minimal effect on low-skilled American workers. *Id.* at 5.

In 2007, the Congressional Budget Office summarized a series of studies about the impact of undocumented immigration on state and local government budgets. Congressional Budget Office, *The Impact of Unauthorized Immigrants on the Budgets of State*

and Local Governments (Dec. 2007).[4] According to the Congressional Budget Office, "most efforts to estimate the fiscal impact of immigration in the United States have concluded that, in aggregate and over the long term, tax revenues of all types generated by immigrants – both legal and unauthorized – exceed the costs of the services they use." *Id.* at 1. However, by many estimates, "the cost of providing public services to unauthorized immigrants at the **state and local levels** exceeds what that population pays in state and local taxes." *Id.* (emphasis added). Most of the costs of immigration are borne by state and local governments, in no small part because the federal government requires state and local governments to provide certain services to all individuals, regardless of legal status. *Id.*

Although the Congressional Budget Office report was released before DAPA, it nonetheless confirms that most of the costs of immigration occur at the state and local level, including costs for education, health care, and law enforcement. *Id.* Whether projected tax revenue increases would offset those local and state costs is less than certain – particularly when DAPA beneficiaries would become eligible for state benefits, such as driver's licenses, unemployment benefits, and worker's compensation as a result of their lawful presence and work authorization. Wyo. Stat. Ann. §§ 31-7-111 (driver's licenses), 27-3-309

[4] Available online at https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-6-immigration.pdf.

(unemployment benefits), and 27-14-102 (worker's compensation).

The Jane Does specifically criticize the court of appeals for "accept[ing] without scrutiny Texas's claim that implementing the Guidance would cause the State to spend at least $130 for each new license issued. . . ." Intv'r Br. 30 (citing Pet. App. 21a). They argue that Texas's alleged costs are based "on speculation that Texas would have to embark on an aggressive employee-hiring and office-building program to process an influx of new applications." *Id.* (citing J.A. 377-82).

Respondents are at a preliminary stage in the litigation, which matters. *Lujan*, 504 U.S. at 561. A plaintiff must support each element of standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Accordingly, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. . . ." *Id.*

The district court, relying on statistics that the Assistant Director of the Texas Department of Public Safety (DPS) Driver License Division provided, made factual findings regarding the cost of issuing driver's licenses to DAPA beneficiaries. Pet. App. 271a-273a. In his declaration, the Assistant Director estimated that "for each additional 1,750 driver license customers seeking a limited term license, DPS would have to

hire 2.03 full time equivalent (FTE) employees to process those issuances." J.A. 379. Therefore, if customer volume increased by 100,000 individuals, it would cost the state approximately $16.23 million or $162.39 per license. J.A. 380. That estimate did not even factor in "costs for card design and additional programming for the Driver License System." J.A. 381. The district court based its calculation on a low estimate of the costs if only 50,000 DAPA beneficiaries applied for licenses, even though ten times that number, an estimated 500,000 undocumented immigrants in Texas, would qualify for DAPA. Pet. App. 20a-21a.

The Jane Does' criticism of the Fifth Circuit is misplaced. Early in its standing analysis, the court noted that Petitioners did not dispute the district court's finding that Texas subsidizes its licenses and would lose at least $130.89 on each license it issued to a DAPA beneficiary. Pet. App. 20a-21a. The Fifth Circuit, therefore, moved on to address issues that Petitioners had raised on appeal, including their argument that Texas's "costs would be offset by other benefits to the state." *Id.*

Petitioners still do not dispute that Texas subsidizes driver's licenses. *See* Br. for Pet'rs 18-35. In fact, Petitioners explicitly recognize that Texas subsidizes driver's licenses but argue that Texas voluntarily chooses to do so and could eliminate the subsidy at any time. *Id.* at 19. The Jane Does' attack on the district court's findings is severely undercut

because the factual determination was a non-issue on appeal.

The Jane Does also attempt to undermine the calculation of Texas's costs with evidence that is outside the record. Specifically, the Jane Does claim that "in the normal course of business, license application fees generate a *profit* that funds all of the driver's license division's operations, including those unrelated to issuing licenses." Intv'r Br. 31 (emphasis in original). To support that sweeping assertion, the Jane Does cite four sections of the Texas Department of Public Safety's December 2013 report – *Operating Budget for Fiscal Year 2014*. *Id.*

In challenging the factual underpinnings of Texas's economic injury, the Jane Does ignore the standard of review for factual findings, which standard is clear error. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-75 (1985). The Jane Does can hardly show clear error by citing four sections of a 280-page report that is not part of the record and which does not speak for itself. Significantly, the report they cite consists of spreadsheets and does not contain summaries or explanations of what the numbers mean or how they should be interpreted. *See* Tex. Dep't of Pub. Safety, *Operating Budget for Fiscal Year 2014* (Dec. 1, 2014).[5] That report reflects the

[5] Available online at https://www.dps.texas.gov/LBB/operatingBudget.pdf.

complexity of state government funding and budgeting. *Id.* It also demonstrates how money moves within government in ways that are often difficult to understand. *Id.* The Jane Does thus fail to demonstrate that the document shows that license application fees generate a **profit** that funds **all** of the driver license divisions' operations, including those unrelated to issuing licenses. *See id.* In fact, fees collected for driver's licenses issued under Tex. Transp. Code § 521.421(a) are deposited "to the credit of the Texas mobility fund"; those fees are not used directly to fund driver license division operations. *See* Tex. Transp. Code § 521.427(a); Pet. App. 272a.[6] Wyoming's statute is similar in that driver's license fees are credited to the highway fund; they do not directly fund the cost of issuing driver's licenses. Wyo. Stat. Ann. § 31-7-104.

The Jane Does unduly simplify the cost of issuing driver's licenses and how states use the fees they collect. State governments are complex and the fees they collect can hardly be said to directly cover the cost of the programs for which those fees are collected. When those fees go to a general fund, it is even harder to trace the funds and delineate which

[6] The Texas Mobility Fund, which is part of the state treasury, was created "to provide a method of financing the construction, reconstruction, acquisition, and expansion of state highways, including costs of any necessary design and costs of acquisition of rights-of-way, as determined by the commission in accordance with standards and procedures established by law." Tex. Const. Art. III, § 49-k(b).

specific government programs and components specific fees fund. Furthermore, there is more to issuing driver's licenses than providing the applicant with the license itself. States act through public servants and must hire and train them, buy or lease buildings for them to work in, provide office equipment for each of them, provide equipment to process the licenses, and then test each license applicant. It is not difficult to conclude that a flood of first-time applicants would exceed existing state infrastructure; the main point being that state governments incur significant costs to provide services to their citizens. The district court is the fact-finding court, and factual determinations and arguments are best made in that court, with the benefit of briefing and argument by the parties.[7]

———♦———

[7] AFL-CIO likewise criticizes Texas's calculation of its projected cost to issue driver's licenses to DAPA beneficiaries. AFL-CIO Br. 17-18. For example, the Assistant Director estimated "that for each additional 1,750 driver license customers **seeking a limited term license**, DPS would have to hire 2.03 full-time equivalent (FTE) employees to process those licenses." J.A. 379 (emphasis added). AFL-CIO claims that this calculation is exaggerated because in fiscal year 2013, Texas issued 5,189,231 **total driver's licenses**, including commercial driver's licenses, and had 2,209 FTE employees. AFL-CIO Br. 17-18, n.7. Thus, by AFL-CIO's calculation, each FTE employee should be able to issue 2,349 driver's licenses per year, whereas Texas estimates that each FTE employee could only issue 862 limited term licenses. *Cf.* J.A. 379-80 to AFL-CIO Br. 17-18.

(Continued on following page)

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PETER K. MICHAEL
Wyoming Attorney General
Counsel of Record
WYOMING ATTORNEY GENERAL'S OFFICE
2320 Capitol Avenue
Cheyenne, Wyoming 82002
(307) 777-7841
peter.michael@wyo.gov

JOHN G. KNEPPER
Chief Deputy Attorney General

DAVID L. DELICATH
Deputy Attorney General

JAMES MICHAEL CAUSEY
Senior Assistant Attorney General

CHRISTYNE M. MARTENS
Senior Assistant Attorney General

The problem with AFL-CIO's calculation is that it looks past the fact that the Assistant Director only took into account how many limited term licenses an FTE employee can issue, not the total number of driver's licenses, including commercial driver's licenses, an FTE employee can issue in any given year. *See* J.A. 379-80. In fact, the statistics that AFL-CIO cites support the proposition that limited term licenses are merely a subset of the total number of driver's licenses that FTE employees issue per year. For instance, according to the Assistant Director, Texas issued 275,875 limited term licenses in fiscal year 2014, but Texas issued far more licenses in total – 4,949,249 in 2014. J.A. 378; Tex. Dep't of Public Safety, *AY16-17 DPS Resource Book* at 188, "Enhance Licensing and Regulatory" (Feb. 1, 2015), https://www.txdps.state.tx.us/LBB/DPSResourceBook.pdf. It therefore stands to reason that Texas's calculation of the number of limited term licenses that an FTE employee can issue is not at odds with AFL-CIO's calculation of the total number of licenses, including commercial licenses, an FTE employee can issue in a year.

PHILIP MURPHY DONOHO
Assistant Attorney General

KATHERINE A. ADAMS
Special Assistant
Attorney General